

2016 ONSC 6723  
Ontario Superior Court of Justice

Rightmeyer v. Fitzgerald

2016 CarswellOnt 16997, 2016 ONSC 6723, [2016] O.J. No. 5619, 273 A.C.W.S. (3d) 46

**MELVIN RIGHTMEYER and HARRY RIGHTMEYER  
(Plaintiffs) and BERNARD FITZGERALD, MARIE-  
FRANCE PARADIS, SUSAN TRIPP, MARK TRIPP and  
564453 ONTARIO INC. c.o.b. KENMAU LTD. (Defendants)**

Graeme Mew J.

Judgment: October 28, 2016

Docket: CV-13-0020-00

Counsel: Kris Bonn, for Plaintiffs  
Christopher Cheung, for Defendant, Kenmau Ltd.

***Graeme Mew J.:***

1 After a four day jury trial, Melvin Rightmeyer's slip and fall claim against the defendant Kenmau was dismissed. The jury found that there was no liability on Kenmau's part for the injuries sustained by Mr. Rightmeyer.

2 Kenmau seeks its costs of the action on a partial indemnity scale up until 30 August 2016 and on a substantial indemnity scale thereafter.

3 By way of background, the trial proceeded on the issue of liability only. Sometime prior to the trial, the defendants Bernard Fitzgerald and Marie-France Paradis were released from the action. The plaintiff also entered into a Perringer agreement with the co-defendants Susan and Mark Tripp pursuant to which the Tripps had paid him \$30,000 (all-inclusive).

4 The parties also agreed damages approximating \$170,000 (inclusive of interest and an OHIP subrogated claim) prior to the commencement of trial.

5 On 30 August 2016, Kenmau offered the plaintiff \$30,000 (all-inclusive) to settle his claim.

6 After the plaintiff had settled with the Tripps on 8 September 2016, and in response to an offer to settle made for the plaintiff for \$55,000, Kenmau made an enhanced offer to contribute \$42,500 over and above the settlement with the Tripps. That offer was not accepted.

7 The trial started on 12 September 2016 (the jury having been selected the previous week).

### **Position of the Parties**

8 The defendant submits that "[a] court can order an elevated costs award when a party fails to accept an offer that is better than the outcome ultimately obtained".

9 The defendant also make specific reference to Rule 57.01(1)(0.a) of the *Rules of Civil Procedure* which provides that in exercising its costs discretion under s. 131 of the *Courts of Justice Act*, the court may consider, in addition to the result in the proceeding and any offer to settle, "the principle of indemnity, including . . . the experience of the lawyer for the party entitled to costs as well as the rates charged and the hours spent by that lawyer".

10 The plaintiff argues that a costs award against Mr. Rightmeyer would serve no purpose. He says that he suffered a serious injury (as evidenced by the agreed quantum of damages) and has suffered enough.

11 Furthermore, the plaintiff argues that if costs are to be awarded, they should be on a partial indemnity scale throughout. A defendant is not entitled to substantial indemnity costs based on offers to settle before trial: *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280 (Ont. C.A.), at paras. 89-92.

### **Scale of Costs**

12 Although not cited by the defendant, the court has a residual discretion, pursuant to Rule 49.13, to take into account a non-conforming or revoked offer to settle in making a costs order.

13 There are a number of cases in which a successful defendant has been awarded substantial indemnity costs from the date that an offer of settlement was made — see generally, Mark M. Orkin, *The Law of Costs*, 2 ed. (Toronto: Canada Law Book looseleaf) at ]§214.

14 Awarding a higher scale of costs from the time of a defendant's offer can, in an appropriate case, not only reward a defendant for having made an offer but, also, serve the important purpose of encouraging settlement in a manner consistent with the overall objectives of Rule 49: see generally, *Dulong v. Merrill Lynch Canada Inc.* [2006 CarswellOnt 1662 (Ont. S.C.J.)], 2006 CanLII 8460 at para. 4; *H.L. Staebler Co. v. Allan* [2008 CarswellOnt 7376 (Ont. S.C.J.)], 2008 CanLII 64396 at para. 9.

15 However, it remains the case that an award of substantial indemnity costs will usually only be warranted where there are exceptional circumstances: see generally, *Davies v. Clarington (Municipality)*, 2009 ONCA 722 (Ont. C.A.) (CanLII).

16 In the present case, there was enough merit to the plaintiff's claim that another defendant settled with the plaintiff before trial by paying the plaintiff \$30,000. Nevertheless, entrusting to an Ontario jury the determination of liability for a slip and fall incident in winter caused by a small patch of ice on a pathway that had been cleared a few hours earlier is akin to participating in a forensic lottery.

17 On this occasion, the jury shut the plaintiff out. But the case was not exceptional. The plaintiff simply made a claim but ultimately lost. The circumstances do not warrant an award of substantial indemnity costs.

### **Quantum of Costs**

18 In fixing an amount for costs that is fair and reasonable, the inability of a party to pay costs may be a relevant factor in determining whether an adverse costs award should be made at all. In *Baines v. Hehar*, 2013 ONSC 849 (Ont. S.C.J.) (CanLII), *Baines v. Hehar* (2013), 114 O.R. (3d) 551 (Ont. S.C.J.), a self-represented plaintiff lost a personal injury trial arising from a motor vehicle accident. The judge ruled against her on a threshold motion. She had not accepted an offer of \$100,000 made two or more years before trial. Addressing the issue of costs, the plaintiff presented what Moore J. described as "compelling" evidence of impecuniosity. He concluded (at para. 29):

I see no utility to awarding costs against Ms. Baines in the amounts sought by the defendants or in any amount. She simply does not possess the financial wherewithal to pay an award of costs and is most unlikely ever to acquire the ability to meet a costs burden arising from this case.

19 In *Walsh v. 1124660 Ontario Ltd.* [2007 CarswellOnt 4459 (Ont. S.C.J.)], 2007 CanLII 27588, at para. 25, Lane J. stated:

The plaintiff is unable to pay and will likely remain so as she lacks both skills and the time and money to acquire them so long as she must care for her children on public support. She incurred this potential liability in the pursuit of the restoration of her employment and her reputation after being dismissed. She has been unsuccessful after a proceeding which no one could have imagined would cost what it did. A costs order against her in the amounts sought, or indeed in any lesser, but significant amount, would have no practical utility to the defendants, but would send a message which would deter others, who may have better cases, from pursuing a remedy because of the disastrous impact of costs if they lose the case. The courts exist to hear the complaints of the people. It is not in the public interest to deter the people from using their own courts for fear of the costs consequences if they lose the case.

20 The deterrent effect of an adverse costs award, while not a factor enumerated in *Rule* 57.01, is nevertheless a practical reality. It should also be part of the equation in deciding whether to settle. An oft-cited criticism of the litigation system in the United States is that there is no generally applicable practice in that regime of the loser paying part of the winner's costs. In our system, however, parties who pursue unsuccessful claims and thereby put those responding to, often, considerable expense, are expected to accept some financial responsibility for their actions.

21 Accordingly, the circumstances will be few and far between where inability or a limited ability to pay a costs award will result in no award of costs being made. Such cases should require evidence not only that the prospective payor does not currently possess the financial wherewithal to pay an award of costs, but that it is most unlikely that the payor will ever acquire the ability to meet a costs burden arising from the case.

22 In this case, beyond the bald statement by the plaintiff's lawyer that Mr. Rightmeyer's ability to work is permanently reduced and limited, there is no evidence of his inability to pay costs now or in the future.

23 Mr. Rightmeyer should, therefore, bear some of the responsibility for the successful defendant's costs. As always, though, in considering the exercise of my discretion, and in particular the factors set out in Rule 57.01, the court should also have regard to the overarching principle of proportionality (Rule 1.04(1)) and to fixing an amount that is fair and reasonable to the parties against whom costs are awarded, rather than an amount fixed by reference to the actual costs incurred by this successful litigant: *Boucher v. Public Accountants Council (Ontario)*, 2004 CanLII 14579, (2004), 71 O.R. (3d) 291 (Ont. C.A.) at para. 26. I would add that in considering what is fair and reasonable it is also appropriate to consider access to justice and the need to strike an appropriate balance between providing a claimant with a forum in which to seek a remedy and indemnifying a successful defendant for at least some of the costs that they incur as a result.

24 The defendant claims partial indemnity fees of \$35,811.96 (inclusive of H.S.T.) and disbursements of \$9,259.93 for a total of \$45,071.89. The fees include the attendance of two counsel at trial. The disbursements include mileage from Toronto to Belleville and hotel accommodation for counsel. The plaintiff did not provide a bill of costs or any other information about the legal fees paid by the plaintiff (if any) which would provide some guidance as to his expectations.

25 I would not certify this case as warranting two counsel at trial. Nor is it reasonable to impose on Mr. Rightmeyer disbursements that could easily have been avoided if the defendant had engaged local lawyers. Both the fees and the disbursements should be reduced on those grounds alone.

26 If one then takes into account what would be fair and reasonable in all of the circumstances, it seems to me that the award of costs against the plaintiff should be modest; enough to send the

message that he must accept responsibility for indemnifying the party he unsuccessfully sued, but no so much as would deter a person of modest means from pursuing justice by advancing a potentially meritorious claim.

**Disposition**

27 I fix the costs payable by the plaintiff to the defendant Kenmau Ltd. in the all-inclusive amount of \$12,500.

*Order accordingly.*